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24856—35——1

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 439

RUFUS R. RAND, JR., PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 12–16) is not reported. The opinion of the Circuit Court of Appeals (R. 38–46) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 19, 1935. (R. 46–47.) The petition for a writ of certiorari was filed September 12, 1935 (R. 48), and was granted October 14,

1935 (R. 48). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The petitioner on May 28, 1928, sold stock which he had received on January 28, 1927, upon a distribution of the estate of Alonzo T. Rand, who died intestate on October 31, 1925, Was the stock "held" by the petitioner for more than two years, so that the gain on the sale thereof is taxable as a "capital net gain" within the meaning of Section 101, Revenue Act of 1928?

STATUTE AND OTHER AUTHORITIES INVOLVED

The statute and other authorities involved are set forth in the Appendix, *infra*, pp. 8–14.

STATEMENT

The facts were found by the Board of Tax Appeals as stipulated by the parties and are substantially as follows (R. 13–15, 32–34):

On April 30, 1925, and prior thereto, the Minneapolis Gas Light Company had outstanding 16,000 shares of common stock of a par value of $50 each. On April 30, 1925, a stock dividend of 175 per cent was issued, and at all times thereafter there were outstanding 44,000 shares of common stock of the company of a par value of $50 each. On January 28, 1927, there were distributed to the petitioner, pursuant to a decree of distribution, 962⅔ shares

of such stock from the estate of Alonzo T. Rand, who died intestate on October 31, 1925.

On May 28, 1928, the petitioner sold the 962⅔ shares of Minneapolis Gas Light Company stock received from the estate of Alonzo T. Rand and received therefor $439,261.05 in cash. The basis of such stock for gain or loss, namely, the value thereof at the time of distribution to the petitioner, was $169,419.33. The taxable gain realized by petitioner upon the sale is $269,841.72.

Alonzo T. Rand, who died intestate October 31, 1925, left an estate of a total value of $2,104,748, consisting of personal property of a market value of $1,840,948, and real estate of a market value of $263,800. The personal property included cash of $223,814.73 and United States Government obligations of a market value of $145,829.60. During administration and prior to January 28, 1927, the date of distribution, the estate had cash receipts of $161,995.97. The total debts and obligations of the estate, paid or payable before and after January 28, 1927, were in the amount of $263,832.29.

Upon audit of the return of the petitioner for the taxable year 1928 the Commissioner made many adjustments and determined a deficiency in tax. The Commissioner determined that the stock sold by the petitioner on May 28, 1928, had been held by him only from the date of distribution, a period less than two years, and accordingly the gain thereon is taxable at the ordinary normal and surtax rates and not at the rates applicable to capital

gains. It was stipulated that if the gain on the sale of the stock is taxable at the rate applicable to capital gains under Section 101 of the Revenue Act of 1928, there is no deficiency, but an overpayment in tax of $13,545.09. It was further stipulated that if the gain on the sale is not a capital gain and not taxable at the rate provided in Section 101 of the Revenue Act of 1928, but at the normal and surtax rates prescribed by the Act, there is a deficiency in tax of $20,736.45.

ARGUMENT

The Circuit Court of Appeals, affirming the Board of Tax Appeals, held that the stock sold on May 28, 1928, was held by the petitioner, within the meaning of the statute, only from the date of distribution thereof to him from the decedent's estate, January 28, 1927, a period of less than two years, and accordingly the profit on the sale may not be taxed as a "capital net gain" but is taxable as ordinary net income. We submit that the decision below is correct.

Section 101 (c) (8) of the Revenue Act of 1928, c. 852, 45 Stat. 791, *infra,* provides that at the election of the taxpayer the tax on net gains from the sale of capital assets may be taxed at 12½ percent (instead of at the ordinary normal and surtax rates) and defines the term "capital assets" as "property *held by the taxpayer* for more than two years." (Italics supplied.) It is further provided that in determining the period for which the taxpayer has held property there shall be included

the period for which the property was held by any other person, if under Section 113 the basis for determining gain or loss on a sale of the property in the hands of the taxpayer is the same as it would have been in the hands of such other person. Subdivision (c) (8) (B), *infra*. Section 113 (a) of the Revenue Act of 1928, *infra*, so far as material here, provides that the basis for determining gain or loss on a sale of property *acquired* after February 28, 1913, shall be the cost thereof, with certain exceptions. Subdivision (a) (2) provides generally that if the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor. Under Subdivision (a) (5) the basis prescribed for real property acquired by general or specific devise or intestacy, and of personal property acquired by an estat[illegible] from the decedent, is the value thereof at the dat[illegible] decedent's death. In all other cases of property acquired either by will or intestacy, however, which include general or residuary bequests, the basis specified is the value of the property *at the time of the distribution to the taxpayer*.

The petitioner received the stock in question on January 28, 1927, upon a distribution of the estate of Alonzo T. Rand, deceased. The decedent died intestate October 31, 1925. Hence, the petitioner acquired the stock by intestacy and under the statute the basis for determining the gain on the sale thereof is the value of such stock at the date

of distribution. The petitioner, conceding that the time of distribution is the date for fixing the basis, contends that the stock was acquired at the date of the decedent's death and was held by him from that time, a period of more than two years before the date of sale. The respondent contends, and the court below held, that the date prescribed for fixing the basis also marks the beginning of the holding period for purposes of the capital gains provisions and accordingly the stock was acquired and held by the petitioner, within the meaning of the statute, only from the date of distribution, less than two years before the sale of the stock.

Thus the question here presented is essentially the same as that involved in *Nancy K. McFeely* v. *Helvering, Commissioner,* No. 24, October Term, 1935, pending on certiorari to the Circuit Court of Appeals for the Third Circuit, which is set for argument immediately preceding the instant case. In the *McFeely* case, the taxpayer, by virtue of a gift in 1925 from her mother of a portion of the latter's statutory interest in her deceased husband's estate, received certain stock in November, 1927, upon a distribution of the decedent's estate. The decedent died in June, 1919, making no provision in his will for his widow. The taxpayer sold the stock in March, 1929. The Circuit Court of Appeals for the Third Circuit, affirming the Board of Tax Appeals, held that the stock was "held" by the taxpayer only from the date of distribution and therefore for less than two years. The position and

contentions of the respondent herein are fully set forth under *Argument* in the brief on behalf of the respondent in the *McFeely* case. In the interest of brevity and to avoid needless repetition and lessen the burden of the Court, the contentions of the respondent are not repeated here, but the *Argument* in the brief for the respondent in the *McFeely* case is incorporated herein by reference.

CONCLUSION

The decision of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted.

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OCTOBER 1935.

APPENDIX

STATUTE AND OTHER AUTHORITIES INVOLVED

Revenue Act of 1928, c. 852, 45 Stat. 791, 811, 815, 818:

SEC. 101. CAPITAL NET GAINS AND LOSSES.

(a) *Tax in case of capital net gain.*—In the case of any taxpayer, other than a corporation, who for any taxable year derives a capital net gain (as hereinafter defined in this section), there shall, at the election of the taxpayer, be levied, collected, and paid, in lieu of all other taxes imposed by this title, a tax determined as follows: a partial tax shall first be computed upon the basis of the ordinary net income at the rates and in the manner as if this section had not been enacted and the total tax shall be this amount plus 12½ per centum of the capital net gain.

* * * * *

(c) *Definitions.*—For the purposes of this title—

(1) "Capital gain" means taxable gain from the sale or exchange of capital assets consummated after December 31, 1921.

(2) "Capital loss" means deductible loss resulting from the sale or exchange of capital assets.

(3) "Capital deductions" means such deductions as are allowed by section 23 for the purpose of computing net income, and are properly allocable to or chargeable against capital assets sold or exchanged during the taxable year.

(4) "Ordinary deductions" means the deductions allowed by section 23 other than capital losses and capital deductions.

(5) "Capital net gain" means the excess of the total amount of capital gain over the sum of (A) the capital deductions and capital losses, plus (B) the amount, if any, by which the ordinary deductions exceed the gross income computed without including capital gains.

(6) "Capital net loss" means the excess of the sum of the capital losses plus the capital deductions over the total amount of capital gain.

(7) "Ordinary net income" means the net income, computed in accordance with the provisions of this title, after excluding all items of capital gain, capital loss, and capital gain.

(8) "Capital assets" means property held by the taxpayer for more than two years (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale in the course of his trade or business. For the purposes of this definition—

(A) In determining the period for which the taxpayer has held property received on an exchange there shall be included the period for which he held the property exchanged, if under the provisions of section 113, the property received has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as the property exchanged.

(B) In determining the period for which

the taxpayer has held property however acquired there shall be included the period for which such property was held by any other person, if under the provisions of section 113, such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person.

(C) In determining the period for which the taxpayer has held stock or securities received upon a distribution where no gain is recognized to the distributee under the provisions of section 112 (g) of this title or under the provisions of section 203 (c) of the Revenue Act of 1924 or 1926, there shall be included the period for which he held the stock or securities in the distributing corporation prior to the receipt of the stock or securities upon such distribution.

* * * * *

SEC. 111. DETERMINATION OF AMOUNT OF GAIN OR LOSS.

(a) *Computation of gain or loss.*—Except as hereinafter provided in this section, the gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the basis provided in section 113, and the loss shall be the excess of such basis over the amount realized.

* * * * *

SEC. 113. BASIS FOR DETERMINING GAIN OR LOSS.

(a) *Property acquired after February 28, 1913.*—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property;

* * * * *

(2) Gift after December 31, 1920.—If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the fair market value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information that the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner;

(3) Transfer in Trust after December 31, 1920.—If the property was acquired after December 31, 1920, by a transfer in trust (other than by a transfer in trust by a bequest or devise) the basis shall be the same as it would be in the hands of the grantor, increased in the amount of gain or decreased in the amount of loss recognized to the grantor upon such transfer under the law applicable to the year in which the transfer was made;

* * * * *

(5) Property Transmitted at Death.—If personal property was acquired by specific bequest, or if real property was acquired by general or specific devise or by intestacy, the basis shall be the fair market value of the property at the time of the death of the decedent. If the property was acquired by the decedent's estate from the decedent, the basis in the hands of the estate shall be the fair

market value of the property at the time of the death of the decedent. In all other cases if the property was acquired either by will or by intestacy, the basis shall be the fair market value of the property at the time of the distribution to the taxpayer. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death; * * *.

Treasury Regulations 74:

ART. 596. *Property transmitted at death.*—In the following cases the basis for determining gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the fair market value of the property at the time of the death of the decedent:

(1) Personal property acquired by specific bequest;

(2) Real property acquired by general or specific devise or by intestacy; and

(3) Property, whether real or personal, in the hands of a decedent's estate, acquired by the estate from the decedent (see article 863).

In all other cases where property was acquired either by will or by intestacy after February 28, 1913, the basis shall be the fair market value of the property at the time of its distribution to the taxpayer.

In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis of such property in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death. Accordingly, if a person is entitled to personal property under such a trust instrument after the grantor's death and if such property would be deemed to be acquired by bequest, other than by specific bequest, were the trust instrument a will, the basis of the property, if acquired after February 28, 1913, would be its fair market value at the time it was distributed to the taxpayer. In all other cases where a person is entitled to property, whether real or personal, under such a trust instrument after the grantor's death, the basis of the property, if acquired after February 28, 1913, shall be its fair market value at the time of the grantor's death.

If the property was acquired prior to March 1, 1913, the gain or loss from the sale or other disposition thereof shall be computed upon the basis provided in section 113 (b) and article 591.

For the purposes of this article, the value of property as appraised for the purpose of the Federal estate tax or in the case of estates not subject to that tax, its value as appraised in the State court for the purpose of State inheritance taxes shall be deemed to be its fair market value at the time of the death of the decedent.

S. Rep. 960, 70th Cong., 1st Sess. (p. 26):

> Accordingly, the committee has revised section 113 (a) (5) and certain related sections, so as to provide that in the case of a specific bequest of personalty or a general or specific devise of realty, or the transmission of realty by intestacy, the basis shall be the fair market value at the time of the death of the decedent. In these cases it may be said, as a matter of substance, that the property for all practical purposes vests in the beneficiary immediately upon the decedent's death, and therefore the value at the date of death is a proper basis for the determination of gain or loss to the beneficiary. The same rule is applied to real and personal property transmitted by the decedent, where the sale is made by the executor. In all other cases the basis is the fair market value of the property at the time of the distribution to the taxpayer. The latter rule would obtain, for example, in the case of personal property not transmitted to the beneficiary by specific bequest, but by general bequests or by intestacy. It would also apply in cases where the executor purchases property and distributes it to the beneficiary.

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